

INTERNATIONAL SILICA CORP.

IBLA 90-395

Decided September 30, 1992

Appeal from a decision of the Las Vegas District Office, Bureau of Land Management, rejecting a mining plan of operations. N54-90-04W.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Plan of Operations--
Federal Land Policy and Management Act of 1976: Wilderness--Mining
Claims: Plan of Operations

The Secretary of the Interior is required by sec. 603(c) of FLPMA, 43 U.S.C. § 1782(c) (1988), to manage lands under review for wilderness suitability so as to prevent impairment of their wilderness characteristics, subject to grandfathered uses and valid existing rights. Under this standard, a plan of operations for a mining claim located after 1976 is properly rejected if it entails impacts which cannot be reclaimed to the point of being substantially unnoticeable by the time the Secretary is to make his recommendation regarding wilderness designation.

2. Federal Land Policy and Management Act of 1976: Plan of Operations--
Federal Land Policy and Management Act of 1976: Wilderness--Mining
Claims: Plan of Operations

Enactment of sec. 603(c) of FLPMA, 43 U.S.C. § 1782(c) (1988), had the effect of amending the Mining Law of 1872 to the extent of precluding mining-related activities on lands within a WSA which would impair the wilderness characteristics of the area except for valid existing rights and the continuation of pre-FLPMA mining activities in the same manner and degree as conducted on Oct. 21, 1976.

3. Federal Land Policy and Management Act of 1976: Plan of Operations--Federal
Land Policy and Management Act of 1976: Wilderness--Mining Claims: Plan of
Operations

Under the regulations at 43 CFR Subpart 3802 governing mining operations within a wilderness study area, a failure of BLM to adjudicate the plan of operations within the time allowed does not constitute approval

of the plan. Although a claimant may proceed, pursuant to 43 CFR 3802.1-5(e), with activities proposed in a plan of operations before agency approval is obtained, if BLM later determines that the action taken impairs wilderness suitability of affected lands it may properly take action to modify or terminate the offending activity.

4. Applications and Entries: Vested Rights--Federal Land Policy and Management Act of 1976: Plan of Operations--Federal Land Policy and Management Act of 1976: Wilderness--Mining Claims: Plan of Operations

A mineral entry final certificate is prepared by BLM for a mining claim after it has determined on the basis of the documents submitted that the claim is apparently valid in that: the land was available at the time of location; acts necessary to keep it in force including annual assessment work have been done; no adverse claim exists; and the applicant has paid the purchase price. However, a mineral examination to establish the discovery of a locatable valuable mineral deposit on the claim is still required to support a patent and, as long as title remains in the United States, mining activities are properly regulated pursuant to relevant statutes and regulations to protect the surface resources.

APPEARANCES: Charles Heisen, partner, Las Vegas, Nevada.

OPINION BY ADMINISTRATIVE JUDGE GRANT

This appeal is brought from a decision of the Las Vegas District Office, Bureau of Land Management (BLM), dated March 19, 1990, rejecting appellant's plan of operations, N54-90-04W, for placer mining claims within a wilderness study area (WSA). 1/ The plan of operations was filed under the Departmental regulations at 43 CFR Subpart 3802, issued pursuant to section 603 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1782 (1988). 2/

1/ The notice of appeal was filed on behalf of International Silica Corporation by Charles Heisen, Manager. The decision under appeal was issued to International Silica, the party filing the plan of operations. However, the statement of reasons specified it was filed by Charles Heisen, partner of International Silica, on his own behalf. It appears that he is now asserting an interest in the claims in his own right giving him standing to pursue the appeal independently. As the plan was filed in the name of International Silica, we have captioned this decision accordingly. The decision is binding on the interest of Heisen in the claims and, hence, we have carefully considered his brief in deciding this appeal.

2/ The plan of operations filed with BLM on Dec. 7, 1989, was titled "Notice of Operations." The BLM decision explained that mining operations

The proposed operations identified in the plan filed with BLM included two open-pit mining operations on the claims and construction of access roads with a total estimated surface disturbance of 4.5 acres. The BLM decision identified the claims as being located within the Muddy Mountain WSA. BLM concluded that the anticipated impacts of the proposed mining operation would impair the suitability of the WSA for preservation as wilderness in violation of the nonimpairment standard set by statute and BLM's Interim Management Policy and Guidelines for Lands Under Wilderness Review (IMP) promulgated pursuant to the statute. 3/

[1] Section 603(a) of FLPMA, 43 U.S.C. § 1782(a) (1988), directs the Secretary of the Interior to review roadless areas of 5,000 acres or more identified during inventory of the public lands as having wilderness characteristics (*i.e.*, WSA's), and report to the President his recommendation as to the suitability of each such area for preservation as wilderness. While an area is under wilderness review and until Congress has rejected any such area for wilderness designation, BLM is required to manage such WSA's in accordance with the nonimpairment mandate of section 603(c) of FLPMA. 43 U.S.C. § 1782(c) (1988); IMP, Ch. I.B.2.b., 44 FR 72018 (Dec. 12, 1979); The Wilderness Society, 106 IBLA 46 (1988); L. C. Artman, 98 IBLA 164 (1987). The IMP provides guidance on the application of nonimpairment criteria in BLM management of WSA's at Chapter I.B.2. An activity is not impairing if it is temporary; any impacts are capable of being reclaimed to a condition of being substantially unnoticeable by the time the Secretary of the Interior is scheduled to send his recommendation to the President; and if, after any needed reclamation is complete, the area's wilderness values have not been degraded so far as to significantly constrain the Secretary's recommendation with respect to the area's suitability or unsuitability for preservation as wilderness. IMP, Ch. I.B.2., 44 FR 72018 (Dec. 12, 1979); 43 CFR 3802.0-5(d); see Havlah Group, 60 IBLA 349, 88 I.D. 1115 (1981).

The starting point for analysis of the permissibility of actions proposed to be undertaken in a WSA rests in the mandate of section 603 of FLPMA that the Secretary manage such lands so as not to impair their suitability for inclusion in the wilderness system. With the exception of grandfathered uses, any activity which impairs such suitability is forbidden. Because the claims covered by mining plan N54-90-04W were located in 1988, after the passage of FLPMA, the standard to be applied is the standard set by section 603(c) of FLPMA, requiring that the land in a WSA must be managed so as not to impair the suitability of land for wilderness.

fn. 2 (continued)

on WSA lands are not authorized upon filing a notice as may be the case with certain operations on non-WSA lands under the surface management regulations at 43 CFR Subpart 3809. See 43 CFR 3809.1-3 (disturbance of less than 5 acres). Hence, BLM treated the filing as a plan of operations under the regulations at 43 CFR Subpart 3802.

3/ The IMP was originally published at 44 FR 72014 (Dec. 12, 1979) and was thereafter amended at 48 FR 31854 (July 12, 1983).

Ralph E. Pray, 105 IBLA 44 (1988); John Loskot, 71 IBLA 165 (1983). Applying this standard, we must conclude that the record supports the BLM finding that the proposed activities would constitute an impairment of the suitability of the area for wilderness preservation.

The IMP defines a temporary impact as one that can easily and immediately be terminated upon designation of the lands as wilderness. A temporary activity that is capable of being reclaimed to a substantially unnoticeable condition by the time the Secretary is scheduled to send wilderness recommendations to the President is permitted by the IMP. "Substantially unnoticeable" is something that either is so insignificant as to be only a very minor feature of the overall area or is not distinctly recognizable to the average visitor as being manmade or man-caused, because of age, weathering, or biological change. Norman G. Lavery, 96 IBLA 294 (1987); Southwest Resource Council, 73 IBLA 39 (1983).

The question before us is whether BLM's March 19, 1990, decision rejecting plan of operations N54-90-04W because it violated the nonimpairment standard was reasonable and is supported by the record. See, e.g., Manville Sales Corp., 102 IBLA 385, 390 (1988). BLM found that the mining operations would impair the suitability of the WSA for preservation as wilderness. Appellant's plan of operations calls for grading of road sections and use of frontend loaders and trucks to remove the ore from the open-pit mine. The surface disturbance would cover 4.5 acres. Such activities do not fit within the definition of temporary impacts nor could they be timely reclaimed to a substantially unnoticeable condition as the time for reclamation had passed before the plan was filed with BLM. The case record shows that the BLM decision was based on the determination that the time allowed for reclamation of temporary uses had passed prior to the submission of the plan. Appellant has not shown error in this conclusion.

The burden of persuasion is on appellant. Norman G. Lavery, 96 IBLA at 299. While appellant's plan of operations did provide for reclamation, the record supports the BLM finding that the proposed operations would impair the wilderness characteristics of land within the WSA because they were not temporary and could not be timely reclaimed. Appellant has not challenged this finding on appeal.

Appellant challenges the BLM decision as being improper in that it issued more than 3 months after the plan of operations was filed and after considerable work was done on the claims. Further, appellant contends that rejection of the plan of operations violates equitable rights in the lands obtained as a result of a prior decision of the Nevada State Office, BLM. That decision acknowledged that applications for patent of the claims including payment of the purchase price and submission of the required proof had been filed. The decision stated that the mineral entries were allowed and that final certificates dated June 7, 1989, had been issued for the claims in the patent applications. Finally, appellant argues that FLPMA did not alter the right to locate, operate, and obtain access to mining claims in a WSA except to preclude unnecessary and undue degradation.

[2] With regard to the last issue raised, we note that it is well established that section 603(c) of FLPMA, 43 U.S.C. § 1782(c) (1988), did in fact amend the mining law as it relates to lands within a WSA. Section 302(b) of FLPMA as codified provides that:

Except as provided in * * * section 1782 * * * of this title and in the last sentence of this paragraph [barring unnecessary and undue degradation], no provision of this section or any other section of this Act shall in any way amend the Mining Law of 1872 or impair the rights of any locators or claims under that Act, including, but not limited to, rights of ingress and egress. [Emphasis added.]

43 U.S.C. § 1732(b) (1988). Passage of FLPMA amended the Mining Law of 1872 to the extent of precluding conduct of mining related activities on lands within a WSA which would impair the wilderness characteristics of the area except for valid existing rights and the continuation of pre-FLPMA mining activities in the same manner and degree as conducted on October 21, 1976. State of Utah v. Andrus, 486 F. Supp. 995, 1005-06 (D. Utah 1979); John Loskot, supra at 168. As these claims were located subsequent to enactment of FLPMA, these exceptions do not apply and operations on appellant's claims are subject to the nonimpairment standard. John Loskot, supra at 168.

[3] Appellant asserts that BLM failed to act on the December 6, 1989, mining plan of operations until March 19, 1990, when it issued its decision rejecting the plan. He states that during this period considerable work was done on his placer claims, adding to access to the deposit as well as an initial test mining operation. It is true that 43 CFR 3802.1-5(a) calls for the authorized BLM officer to acknowledge receipt of the plan within 30 days and to act to determine the acceptability of the plan. ^{4/} The case file discloses that the plan of operations filed on December 7, 1989, was reviewed and analyzed in a memorandum dated December 11, 1989. The memorandum found that the proposed activities would not comply with the nonimpairment mandate since the deadline for reclamation on the subject lands was March 30, 1989. While it appears from the case record that appropriate action was promptly taken to determine the acceptability of the plan, there is nothing in the record to indicate that appellant was notified of this finding prior to the March 19, 1990, decision.

Regardless of the unfortunate delay in notifying the operator of the rejection of the plan of operations, this does not authorize actions which would impair the wilderness suitability of lands within the WSA. The regulations permit the operator to begin operations if BLM does not act within

^{4/} Departmental regulation 43 CFR 3802.1-5(d)(3) does permit the authorized officer to notify the operator in writing that an additional 60 days would be needed to review the plan. This apparently was not done in this case.

the requisite time, but they specifically state that this does not constitute approval of the plan. 43 CFR 3802.1-5(e). Furthermore, failure to act on the plan within the requisite time does not preclude BLM from ensuring that such operations satisfy the nonimpairment standard. The regulations provide that, even if the operator has begun operations, "if the authorized officer at a later date finds that operations under the plan are impairing wilderness suitability, the authorized officer shall notify the operator that the operations are not in compliance with these regulations and what changes are needed." 43 CFR 3802.1-5(e). In the preamble to the promulgation of these regulations, operators were cautioned that they assumed certain risks: "Those operators who have submitted a plan and after 30 days has elapsed, wish to take the risk and begin operations can proceed with the real possibility that their operations will be terminated if they are found to be impairing wilderness characteristics of the area." 45 FR 13968, 13972 (Mar. 3, 1980). Thus, no rights were obtained by commencing operations without approval of a plan. 5/

[4] On June 7, 1989, BLM issued "final certificates" for the placer claims covered by N54-90-04W. Appellant argues that issuance of the final certificates bestowed the right to enter and use the placer claims. A final certificate or mineral entry final certificate is prepared by BLM after it has determined on the basis of adjudication of the documents submitted that a location is apparently valid, *i.e.*, that the land was available for location of mining claims at the time the claim was located; that everything necessary to keep it in force, including annual assessment work, has been done; that no adverse claim exists; that the applicant has paid the purchase price; and that the patent applicant, provided he proves a valuable discovery, is entitled to patent. 2 American Law of Mining, §§ 51.09, 51.10[1] (2d ed. 1984); Scott Burnham (On Reconsideration), 102 IBLA 363, 366 (1988). However, BLM must still conduct a mineral examination of the claims to establish the discovery of a valuable mineral deposit on the claims before it issues a patent. Further, issuance of the final certificate does not preclude BLM from contesting the claims after providing notice and an opportunity for a hearing to determine whether a discovery of a valuable mineral deposit has been shown. United States v. Whittaker (On Reconsideration), 102 IBLA 162, 166 (1988); see Cameron v. United States, 252 U.S. 450, 460-61 (1920); 2 American Law of Mining, § 51.10[3] (2d ed. 1984). Legal title to lands subject to unpatented mining claims remains in the United States pending issuance of patent. Hence, the United States may regulate mining

5/ Appellant also asserts on appeal that BLM is refusing to conduct the minerals examination needed to process the patent application filed for the claims covered by the plan of operations. Charles Heisen states he was told explicitly that the final examination would not be considered until the claims have been reclaimed. In the absence of a written decision adjudicating appellant's patent application, this matter is not properly before us in the present appeal. The issue in this appeal is whether BLM properly rejected plan of operations N54-90-04W because it would impair the wilderness suitability of lands within the Muddy Mountains WSA.

activities on Federal lands to protect the surface resources. Therefore, BLM must manage lands in a WSA in accordance with section 603(c) of FLPMA, even after final certificates are issued.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

C. Randall Grant, Jr.
Administrative Judge

I concur:

Franklin D. Arness
Administrative Judge